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10 UNITED STATES DISTRICT COURT  
11 SOUTHERN DISTRICT OF CALIFORNIA

12 HAMED FATHI,

13 Plaintiff,

14  
15 v.

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17 J.P MORGAN CHASE BANK, N.A.,  
18 *et al.*,

19 Defendants.  
20

Case No. 13-cv-2639-BAS(RBB)

**ORDER GRANTING  
DEFENDANT'S MOTION TO  
DISMISS WITHOUT LEAVE TO  
AMEND**

**[ECF No. 11]**

21 On November 1, 2013, Plaintiff Hamed Fathi, who is proceeding *pro se*,  
22 commenced this action related to a residential loan and subsequent initiation of  
23 foreclosure proceedings by Defendant J.P. Morgan Chase Bank, N.A. ("Chase").  
24 Chase now moves to dismiss Mr. Fathi's First Amended Complaint ("FAC") under  
25 Federal Rule of Civil Procedure 12(b)(6).

26 The Court finds this motion suitable for determination on the papers submitted  
27 and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the  
28 Court **GRANTS WITHOUT LEAVE TO AMEND** Chase's motion to dismiss.

1 **I. BACKGROUND<sup>1</sup>**

2 On October 17, 2005, Mr. Fathi obtained a residential loan from Washington  
3 Mutual Bank, F.A. (“WaMu”) in the amount of \$606,000.00 for real property located  
4 in Escondido, California. (FAC ¶¶ 4–5, Ex. 1.) The loan was secured by a deed of  
5 trust. (*Id.* ¶ 5.) According to documents that Mr. Fathi attached to the FAC, the deed  
6 of trust identifies Mr. Fathi as borrower, WaMu as lender, and California  
7 Reconveyance Company as trustee. (*Id.* ¶ 5, Ex. 1.)

8 Mr. Fathi alleges that Chase is the successor-in-interest to WaMu. (FAC ¶ 3.)  
9 He further alleges that “Chase acquired certain assets and liabilities of WaMu from the  
10 FDIC acting as receiver, including WaMu’s interest in the Loan that is the subject of  
11 this action, pursuant to the Purchase and Assumption Agreement . . . between the FDIC  
12 and Chase dated 09/25/208 [sic].” (*Id.* ¶ 6.) Both parties attach the Purchase and  
13 Assumption Agreement between Chase and the FDIC for the acquisition of the  
14 aforementioned assets. (FAC Ex. 2; Def.’s RJN Ex. B.)

15 In March 2009, Quality Loan Service Corporation (“Quality Loan”) was  
16 substituted as trustee under the deed of trust. (FAC ¶ 8, Ex. 4; Def.’s RJN Ex. C.)  
17 Thereafter, Quality Loan recorded a notice of default. (FAC ¶ 7, Ex. 3; Def.’s RJN Ex.  
18 D.) According to the notice of default, Mr. Fathi was \$17,051.67 in arrears as of  
19 March 17, 2009. (FAC Ex. 3; Def.’s RJN Ex. D.) In June 2009, July 2010, July 2011,  
20 December 2011, and December 2012, Quality Loan recorded notices of trustee’s sale.  
21 (FAC ¶¶ 9–12, Exs. 5–7; Def.’s RJN Exs. E–I.)

22 Mr. Fathi also alleges that at the time WaMu issued his home loan, “it was not  
23 licensed to engage in residential lending in the State of California.” (FAC ¶ 13.)  
24 According to Mr. Fathi, after the note and deed of trust were “issued and executed,”  
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26 <sup>1</sup> Chase requests that the Court take judicial notice (“RJN”) of various documents related to  
27 Mr. Fathi’s loan. (ECF No. 11-1.) Many of these documents are also attached to the FAC. Insofar  
28 as the Court relies on any of these documents, the Court **GRANTS** the unopposed request under  
Federal Rule of Evidence 201. *See* Fed. R. Evid. 201(a) (a court may take judicial notice of a fact that  
“can be accurately and readily determined from sources whose accuracy cannot reasonably be  
questioned”).

1 WaMu assigned the note to a trust referred to as “WaMu Securities Trust, Series 2008-  
 2 2.” (*Id.* ¶ 14.) Through that assignment, Mr. Fathi contends that WaMu “divested  
 3 itself of ownership of the Note and security interest attached to [it] which encumbered  
 4 Plaintiff’s property.” (*Id.*) Mr. Fathi further alleges that “[w]hen Chase took over  
 5 certain assets from WaMu, through the FDIC, [sic] did not acquire any interest in the  
 6 WaMu Securities Trust, Series 2008-2, because at the time WaMu was taken over by  
 7 the FDIC, it did not have any interest in said trust.” (*Id.* ¶ 15.) Consequently, when  
 8 Chase entered into the Purchase and Assumption Agreement, “it did not acquire the  
 9 right to foreclose on the Note and [deed of trust].” (*Id.* ¶¶ 16–18.) Rather, the WaMu  
 10 Securities Trust, Series 2008-2 actually retained all rights related to Mr. Fathi’s note  
 11 and deed of trust. (*Id.*)

12 On November 1, 2013, Mr. Fathi commenced this action against Chase. After  
 13 the Court granted Chase’s motion to dismiss, Mr. Fathi was given leave to file an  
 14 amended complaint as to all claims except the one brought under 42 U.S.C. § 1983.  
 15 On March 3, 2014, Mr. Fathi filed his FAC in which he asserts one claim for wrongful  
 16 foreclosure under 42 U.S.C. § 1983. Chase now moves to dismiss the FAC under Rule  
 17 12(b)(6). Mr. Fathi opposes.

## 18 19 **II. LEGAL STANDARD**

20 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil  
 21 Procedure tests the legal sufficiency of the claims asserted in the complaint. Fed. R.  
 22 Civ. P. 12(b)(6); *Navarro v. Block*, 250 F.3d 729, 731 (9th Cir. 2001). The court must  
 23 accept all factual allegations pleaded in the complaint as true and must construe them  
 24 and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill*  
 25 *v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). To avoid a Rule  
 26 12(b)(6) dismissal, a complaint need not contain detailed factual allegations, rather, it  
 27 must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*  
 28 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has “facial plausibility when the

1 plaintiff pleads factual content that allows the court to draw the reasonable inference  
2 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.  
3 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts  
4 that are ‘merely consistent with’ a defendant’s liability, it stops short of the line  
5 between possibility and plausibility of ‘entitlement to relief.’” *Iqbal*, 556 U.S. at 678  
6 (quoting *Twombly*, 550 U.S. at 557).

7 “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief”  
8 requires more than labels and conclusions, and a formulaic recitation of the elements  
9 of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (quoting *Papasan v.*  
10 *Allain*, 478 U.S. 265, 286 (1986)) (alteration in original). A court need not accept  
11 “legal conclusions” as true. *Iqbal*, 556 U.S. at 678. Despite the deference the court  
12 must pay to the plaintiff’s allegations, it is not proper for the court to assume that “the  
13 [plaintiff] can prove facts that [he or she] has not alleged or that defendants have  
14 violated the . . . laws in ways that have not been alleged.” *Associated Gen. Contractors*  
15 *of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

16 Generally, courts may not consider material outside the complaint when ruling  
17 on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d  
18 1542, 1555 n.19 (9th Cir. 1990). However, documents specifically identified in the  
19 complaint whose authenticity is not questioned by parties may also be considered.  
20 *Fecht v. Price Co.*, 70 F.3d 1078, 1080 n.1 (9th Cir. 1995) (superceded by statutes on  
21 other grounds). Moreover, the court may consider the full text of those documents,  
22 even when the complaint quotes only selected portions. *Id.* It may also consider  
23 material properly subject to judicial notice without converting the motion into one for  
24 summary judgment. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

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1 As a general rule, a court freely grants leave to amend a complaint which has  
 2 been dismissed. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when  
 3 “the court determines that the allegation of other facts consistent with the challenged  
 4 pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well*  
 5 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

### 6 7 **III. DISCUSSION**

8 As a preliminary matter, Mr. Fathi purports to assert one claim for wrongful  
 9 foreclosure under 42 U.S.C. § 1983. To the extent that Mr. Fathi is truly asserting a  
 10 civil-rights claim under 42 U.S.C. § 1983, this Court **GRANTS** Chase’s motion to  
 11 dismiss for the reason stated in the February 12, 2014 order granting Chase’s previous  
 12 motion to dismiss. There is no allegation of state action and a § 1983 claim generally  
 13 does not apply to private actors. *See West v. Atkins*, 487 U.S. 42, 28 (1988).

14 However, since Mr. Fathi is proceeding *pro se*, this Court will assume for the  
 15 sake of this motion that Mr. Fathi intended to assert a wrongful-foreclosure claim and  
 16 not a civil-rights claim under 42 U.S.C. § 1983. Nonetheless, the wrongful-foreclosure  
 17 claim also fails because this Court finds that Mr. Fathi lacks standing to challenge  
 18 Chase’s authority to foreclose, and alternatively, because Mr. Fathi fails to allege valid  
 19 and viable tender.

#### 20 21 **A. Mr. Fathi Cannot Challenge Chase’s Standing to Foreclose.**

22 California’s nonjudicial-foreclosure scheme “provide[s] a comprehensive  
 23 framework for the regulation of a nonjudicial foreclosure sale pursuant to the power of  
 24 sale contained in a deed of trust.” *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.  
 25 App. 4th 1149, 1154 (1985) (quoting *Moeller v. Lien*, 25 Cal. App. 4th 822, 830  
 26 (1994)) (internal quotation marks omitted). “Because of the exhaustive nature of this  
 27 scheme, California appellate courts have refused to read any additional requirements  
 28 into the non-judicial foreclosure statute.” *Id.* (quoting *Lane v. Vitek Real Estate Indus.*

1 *Grp.*, 713 F. Supp. 2d 1092, 1098 (E.D. Cal. 2010)) (internal quotation marks omitted).  
 2 Thus, in *Gomes*, the California court refused to allow the plaintiff to bring a court  
 3 action to determine whether the defendant was the party authorized to initiate the  
 4 foreclosure process. *Gomes*, 192 Cal. App. 4th at 1154-57. “[N]owhere does the  
 5 statute provide for a judicial action to determine whether the person initiating the  
 6 foreclosure process is indeed authorized.” *Id.* at 1155.

7 Similarly, in this case, Mr. Fathi contends that Chase lacked standing to pursue  
 8 the foreclosure against his property because it did not acquire that interest from WaMu  
 9 through the Purchase and Presumption Agreement. Rather, he alleges that that interest  
 10 was assigned to the WaMu Securities Trust, Series 2008-2. In short, Mr. Fathi alleges  
 11 that Chase lacks a clear chain of title to his note.

12 By seeking a determination of whether Chase may properly initiate foreclosure,  
 13 Mr. Fathi is “attempting to interject the courts into this comprehensive judicial  
 14 scheme.” *See Gomes*, 192 Cal. App. 4th at 1154. But “[n]othing in the statutory  
 15 provisions establishing the nonjudicial foreclosure process suggests that such a  
 16 proceeding is permitted or contemplated.” *Id.* Therefore, because Mr. Fathi  
 17 improperly attempts to make Chase demonstrate its authority to foreclose, his  
 18 wrongful-foreclosure claim ultimately fails. *See id.*

#### 19 20 **B. This Court Declines to Follow *Glaski*.**

21 Relying almost exclusively on *Glaski v. Bank of America, National Association*,  
 22 218 Cal. App. 4th 1079 (2013), Mr. Fathi argues that he, as a borrower, has standing  
 23 to preemptively challenge an entity’s interest in the debt and authority to foreclose, and  
 24 that “tender is not required for the borrower under a Deed of Trust . . . where the  
 25 foreclosure sale is void rather than voidable, such as where the borrower proves that  
 26 the entity lacked the authority to foreclose on the property.” (Pl.’s Opp’n 2:2–3:2,  
 27 4:2–7:3.)

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1 In *Glaski*, the California Court of Appeal for the Fifth Appellate District found  
2 that a borrower

3 may challenge the securitized trust's chain of ownership by  
4 alleging the attempts to transfer the deed of trust to the  
5 securitized trust (which was formed under New York law)  
6 occurred after the trust's closing date. Transfers that violate  
the terms of the trust instrument are void under New York  
law, and borrowers have standing to challenge void  
assignments of their loans[.]

7 *Glaski*, 218 Cal. App. 4th at 1083.

8 Though a few courts have endorsed *Glaski*, many more California courts have  
9 rejected it. *See Sanders v. Sutton Funding, LLC*, No. 10-CV-2142, 2014 WL 2918590,  
10 at \*5 (S.D. Cal. June 26, 2014) (Sammartino, J.) (citing numerous California cases).  
11 Chief among the California courts rejecting *Glaski* is the California Court of Appeal  
12 for the Fourth Appellate District, which concluded that “[a]s an unrelated third party  
13 to the alleged securitization, and any other subsequent transfers of the beneficial  
14 interest under the promissory note, [the plaintiff] lacks standing to enforce any  
15 agreements, including the investment trust’s pooling and servicing agreement, relating  
16 to such transactions.” *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497,  
17 515 (2013). “District courts in the Ninth Circuit have generally rejected *Glaski*, and  
18 sided with *Jenkins*, noting *Glaski* is a minority view.” *Lanini v. JPMorgan Chase*  
19 *Bank*, No. 2:13-CV-0027, 2014 WL 1347365, at \*5 (E.D. Cal. Apr. 4, 2014); *see also*  
20 *Sanders*, 2014 WL 2918590, at \*5 (citing numerous federal cases). “Until either the  
21 California Supreme Court, the Ninth Circuit, or other appellate courts follow *Glaski*,  
22 this Court will continue to follow the majority rule.” *Newman v. Bank of N.Y. Mellon*,  
23 No. 1:12-CV-1629, 2013 WL 5603316, at \*3 n.2 (E.D. Cal. Oct. 11, 2013) (citations  
24 omitted). This Court also finds no reason to determine otherwise.

### 25 26 **C. Mr. Fathi Fails to Allege Tender.**

27 “Under California law, the ‘tender rule’ requires that as a precondition to  
28 challenging a foreclosure sale, or any cause of action implicitly integrated to the sale,

1 the borrower must make a valid and viable tender of payment of the secured debt.”  
 2 *Montoya v. Countrywide Bank*, No. C09-00641, 2009 WL 1813973, at \*11 (N.D. Cal.  
 3 June 25, 2009) (citations omitted). “As a general rule, a plaintiff may not challenge the  
 4 propriety of a foreclosure on his or her property without offering to repay what he or  
 5 she borrowed against the property.” *Intengan v. BAC Home Loans Servicing LP*, 214  
 6 Cal. App. 4th 1047, 1053 (2013).

7 Once again relaying on *Glaski*, Mr. Fathi argues that because the foreclosure sale  
 8 is void rather than voidable, he is not required to allege tender. *Glaski* explicitly states  
 9 that “[t]ender is not required where the foreclosure sale is void, rather than voidable,  
 10 such as when a plaintiff proves that the entity lacked the authority to foreclose on the  
 11 property.” *Glaski*, 218 Cal. App. 4th at 1100. However, as the Court discussed above  
 12 in declining to follow *Glaski*, Mr. Fathi does not and cannot demonstrate that the  
 13 underlying foreclosure is void. Consequently, Mr. Fathi bound by the tender rule. *See*  
 14 *Intengan*, 214 Cal. App. 4th at 1053.


15 In this case, Mr. Fathi fails to make any allegation of valid and viable tender of  
 16 payment of the secured debt. *See Montoya*, 2009 WL 1813973, at \*11. Therefore, his  
 17 wrongful-foreclosure claim also fails under the tender rule. *See id.*

#### 18 19 **IV. CONCLUSION & ORDER**

20 In light of the foregoing, the Court **GRANTS WITHOUT LEAVE TO**  
 21 **AMEND** Chase’s motion to dismiss. *See Cervantes v. Countrywide Home Loans, Inc.*,  
 22 656 F.3d 1034, 1041 (9th Cir. 2011) (“[A] district court may dismiss without leave  
 23 where . . . amendment would be futile.”); *see also Schreiber Distrib.*, 806 F.2d at 1401.

24 **IT IS SO ORDERED.**

25  
26 **DATED: July 2, 2014**

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**Hon. Cynthia Bashant**  
**United States District Judge**